

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

July 8, 2021

VIA ELECTRONIC MAIL ONLY

City of Albuquerque
Alan V. Heinz, Esq.
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Re: Inspection of Public Records Act Complaint – Christopher Scott Jenkins

Dear Mr. Heinz:

Thank you for your response to our inquiry regarding the complaint filed with the Office of the Attorney General by Mr. Christopher Scott Jenkins alleging that the City of Albuquerque (hereinafter the “City”) violated the Inspection of Public Records Act (“IPRA”), NMSA 1978, Sections 14-2-1 to -12 (1947, as amended through 2019). As you know, Mr. Jenkins alleges that the City violated IPRA in connection with two public records requests submitted on his behalf on January 15, 2020 and October 15, 2020. Having carefully reviewed the documentation provided to us, we are concerned as to the sufficiency of the City’s written communications with Mr. Jenkins. We recommend that the City issue Mr. Jenkins a revised “written explanation of denial,” Section 14-2-11(B), and that it inform future records requestors of when they may expect to receive further communications from the City whenever declaring requests excessively broad and burdensome.

Background

In New Mexico, “all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of public officers and employees.” Section 14-2-5. Pursuant to this express public policy, the Inspection of Public Records Act provides that the public has the right to inspect all public records held by or on behalf of government agencies except as provided by law. *See generally* § 14-2-1. In construing IPRA and its various provisions, New Mexico’s appellate courts consistently interpret the statute in light of its purpose of facilitating transparency and accountability in government. *See New Mexico Found. for Open Gov’t v. Corizon Health*, 2020-NMCA-014, ¶ 15 (explaining that “IPRA must be construed in light of its purpose”). *See also* Attorney General’s Inspection of Public Records Act Compliance Guide, p. 1 (8th ed. 2015)

(“IPRA Guide”) (observing that “courts interpreting the Act have established a clear presumption in favor of access”).

Mr. Jenkins’ complaint to our Office arises out of a domestic incident to which officers of the Albuquerque Police Department responded on or about September 5, 2019. We have little information about this incident, but we understand that it led to an investigation of child abuse or neglect as contemplated by the Abuse and Neglect Act, NMSA 1978, Sections 32A-4-1 to -35 (1993, as amended through 2021). It appears that no charges were filed in connection with the incident.

Through his attorneys,¹ Mr. Jenkins submitted a public records request to the City on January 15, 2020 seeking records regarding the domestic incident. In particular, Mr. Jenkins sought “all photographs, video and/or audio recordings- including but not limited to belt tapes, body cameras, dash cameras--- related to a call for service to the residence of Christopher Jenkins ... on or about September 5, 2019” as well as “all reports, supplemental reports and warrants related to the same.” The City responded to this first request two days later, on January 17, 2020, by acknowledging its receipt and explaining that “it may take up to fifteen (15) calendar days to respond.” Fifteen days after receiving the request, on January 30, 2020, the City responded again by declaring the request to be “excessively burdensome and broad” and stating that the City needed an additional – but unspecified – time to respond.

The City’s declaration that Mr. Jenkins’ first request was excessively burdensome or broad began a more than five-month period of delays that consisted of approximately six separate requests for extensions of time to respond. On February 7, 2020, the City’s records custodian contacted Mr. Jenkins’s attorneys to state that the City is “still processing your request” and adding, “You will receive further communication when we have completed your request.” The custodian sent identical messages again on February 18, 2020, February 28, 2020, and March 13, 2020. Importantly, none of these messages informed Mr. Jenkins’s attorneys of how long the City needed to respond, and this prompted them to contact the City on March 13, 2020 to request “a more concrete response and an estimated completion date for this request.” It appears that the City did not respond to this question until April 15, 2020, when it contacted the attorneys to explain that the City was “currently gathering or reviewing records for your request” and that it would “communicate with you as those records become available.” The City’s records custodian sent an identical message on April 23, 2020 but did not otherwise respond again for more than three months, until July 28, 2020. It is necessary to observe, however, that during this time, in approximately early March 2020, the COVID-19 pandemic arrived in New Mexico and this appears to have significantly delayed the City’s processing of the request.

After apparently attempting to contact Mr. Jenkins’s attorneys by phone in late July 2020, the City responded substantively to the first request by denying it in its entirety on August 6, 2020. The City explained that the requested records were exempt under IPRA’s law enforcement records exception, see Section 14-2-1(D), and the entirety of the Abuse and Neglect Act. The City’s

¹ The law firm of Kennedy, Kennedy & Ives, PC, appears to have represented Mr. Jenkins at the time of the first request, and we understand that the firm submitted the request on his behalf. Since the City’s response to our inquiry referred to both requests as having been submitted by Mr. Jenkins “through an agent,” we will refer herein to Mr. Jenkins as the requestor.

records custodian did not say who in particular was responsible for this denial, simply explaining that “[w]e cannot permit inspection of these records.” However, the City added the following: “If your firm decides it would like copies of the requested records, please provide a letter of representation and we can produce them in accordance with the Children’s Code.”

Mr. Jenkins, through an unspecified agent, sent a second records request to the City on October 15, 2020. In this request, he sought “all email correspondence between IPRA office and Kennedy Kennedy and Ives regarding IPRA request #20-356” as well as all “lapel/body cam footage from all 7 officers on scene” and the “911 calls” for the incident on September 5, 2019. Three business days later, on October 20, 2020, the City’s records custodian responded by declaring this request “excessively burdensome,” explaining that it would need additional time to respond, and observing that in general, due to the COVID-19 pandemic, “some requests may take 45-60 days.” The City did not respond to Mr. Jenkins again for almost three months, until January 14, 2021, when it responded by providing some of the requested records and withholding others. In that substantive response, the City’s records custodian explained that “my office” had redacted personal identifier information from some of the responsive records and withheld others pursuant to a number of exceptions in law. These exceptions were IPRA’s law enforcement records exception, the entirety of the Abuse and Neglect Act, the entirety of the Victims of Crime Act, and the Victim’s Rights provision of the State Constitution. *See* N.M. Const. art. II, § 24. The City’s records custodian again did not say who in particular was responsible for this denial, simply explaining that “my office” redacted records and that “we cannot permit inspection” of other records.

Mr. Jenkins alleges that the City violated IPRA in a number of different respects in connection with these two records requests. He first argues that the City violated IPRA by withholding records responsive to his request, arguing that “[n]o records were provided.” The City responded to this allegation by stating that it had allowed inspection of the “email correspondence” requested by Mr. Jenkins on October 15, 2020 but not “the additional records . . . as they are exempt from public inspection under the Abuse and Neglect Act, NMSA 1978, Section 32A-4-33(A).” Next, Mr. Jenkins appears to argue that the City had not responded to his requests timely and that it had not provided him “a written explanation” of its denials. The City denies this allegation as well.

Withheld Records

The first allegation in Mr. Jenkins’ complaint is that the City improperly denied him the opportunity to inspect records responsive to both of his requests. For our purposes, this issue only implicates the Abuse and Neglect Act, since in response to our inquiry the City cited only Section 32A-4-33(A) as the basis for its decision to withhold records. Although we cannot opine definitively on this issue, we would nevertheless remind the City that the confidentiality conferred by Section 32A-4-33(A) is itself subject to an exception that may apply in this situation.

Preliminarily, we would preface our analysis of this issue by again stating that we unable to opine definitively as to whether Section 32A-4-33(A) authorized the City to withhold the responsive records. Most importantly, we have not been able to review these records ourselves so as to determine whether this statutory exception to disclosure applies. In addition, the confidentiality conferred by Section 32A-4-33(A) depends on a number of specific factual circumstances – the nature of the law enforcement investigation and whether that related to child neglect or abuse, for

example, as well as the identity of the requestor – of which we have no information. As a result, we cannot say whether the City acted lawfully in withholding these responsive records.

More substantively, Section 32A-4-33(A) of the Abuse and Neglect Act clearly represents an exception to disclosure through IPRA. In full, this statutory provision reads as follows:

All records or information concerning a party to a neglect or abuse proceeding, including social records, diagnostic evaluations, psychiatric or psychological reports, videotapes, transcripts and audio recordings of a child's statement of abuse or medical reports incident to or obtained as a result of a neglect or abuse proceeding or that were produced or obtained during an investigation in anticipation of or incident to a neglect or abuse proceeding shall be confidential and closed to the public.

Section 32A-4-33(A). This exception to disclosure appears to have a broad scope, including within its ambit “[a]ll records or information” regarding a neglect or abuse proceeding as well as those investigations conducted “in anticipation of . . . a neglect or abuse proceeding.”

However, Section 32A-4-33(A) does contain exceptions to its general rule of confidentiality. *See generally State v. Garcia*, 2013-NMCA-064, ¶ 25. For instance, Section 32A-4-33(B) provides that government agencies in possession of records or information regarding neglect or abuse proceedings or investigations may permit inspection by “the parties” to such proceedings as well as court staff, guardians ad litem, law enforcement officials, and other specified individuals. Even more importantly, Section 32A-4-33(C) specifies that parents and legal guardians may access these records, subject to minor redactions. *See* § 32A-4-33(C) (“A parent, guardian or legal custodian whose child has been the subject of an investigation of abuse or neglect where no petition has been filed shall have the right to inspect any medical report, psychological evaluation, law enforcement reports or other investigative or diagnostic evaluation; provided that any identifying information related to the reporting party or any other party providing information shall be deleted.”).

Applying these principles to the City and its decision to withhold responsive records from Mr. Jenkins, there is some indication that he may be the parent of the child who was the subject of the abuse or neglect investigation. We note that, in explaining its denial of Mr. Jenkins’ first request to his attorneys, the City stated the following: “If your firm decides it would like copies of the requested records, please provide a letter of representation and we can produce them in accordance with the Children’s Code.” This suggests to us that Mr. Jenkins might be the parent of the child who was the subject of the abuse or neglect investigation, an inference that is supported somewhat by the fact that, as we understand it, officers of the Albuquerque Police Department responded to Mr. Jenkins’ own home during the incident in question. In any case, speculation aside, we would simply remind the City that, if indeed Mr. Jenkins is a “parent, guardian or legal custodian whose child has been the subject of an investigation of abuse or neglect,” he might have the right to inspect the records in question pursuant to Section 32A-4-33(C). The confidentiality conferred by Section 32A-4-33(A), while operating as a strong exception to disclosure in many cases, is not absolute.

Sufficiency of Written Communications

We have slightly more concern with the sufficiency of the City's written communications with Mr. Jenkins (and his attorneys) than we do with its decision to withhold the responsive records. This issue itself consists of two separate types of communications: the City's requests for additional time, and its written explanations of its decision to deny both requests (the second request being only a partial denial). We think the City needs to issue Mr. Jenkins a revised denial letter and that it should improve its written communications with records requestors more generally.

Taking first the matter of the City's requests for additional time to respond to records requests, we cannot ignore the fact that it issued seven such requests to Mr. Jenkins and not one of them identified a specific date by which he might expect a further response. For instance, in responding to Mr. Jenkins' first request, the City on four occasions told him that it was "still processing your request" and that, "You will receive further communication when we have completed your request." After Mr. Jenkins' attorneys specifically asked the City for "an estimated completion date for this request," the City twice responded not by answering this question but by instead stating that it would "communicate with you as those records become available." Similarly, in its three-day letter acknowledging receipt of Mr. Jenkins' second request, the City stated only that in general, due to the COVID-19 pandemic, "some requests may take 45-60 days," and thereafter did not respond to Mr. Jenkins for almost three months.

Even if not expressly mandated by Section 14-2-10, it is *clearly* a best practice for public bodies to inform records requestors when they may expect a further response whenever they declare a request excessively broad and burdensome and request additional time. To be sure, we recognize that the City receives a tremendous number of public records requests and that the COVID-19 pandemic impaired its response to Mr. Jenkins in particular. However, the City should recognize that it runs an unnecessary risk of litigation by failing to tell requestors when specifically it will respond next.² See § 14-2-10 ("The requester may deem the request denied and may pursue the remedies available pursuant to the Inspection of Public Records Act if the custodian does not permit the records to be inspected in a reasonable period of time."). It is in the City's – and the public's – best interest for it to inform requestors of when specifically it will respond next to the request.

Finally, the City's written communications with Mr. Jenkins informing him of its reasons for denying his requests were also deficient. The simple fact is that IPRA requires any public body denying a records request to "set forth the names and titles or positions of each person responsible for the denial." Section 14-2-11(B)(2). Neither of the City's denial letters satisfied this requirement. Although in some circumstances the signature line of the public body's records custodian may satisfy this requirement, here the City's communications with Mr. Jenkins stated only that "[w]e cannot permit inspection of these records" and that "my office" had redacted personal identifier information from some of the responsive records and withheld others pursuant to a number of exceptions in law. In those circumstances, where the text of the "written explanation of denial" indicates that an entire office made the decision to withhold a record, the signature of

² Where "reasonable," the City may request an additional extension of time on or before the expected response date. Section 14-2-10.

the records custodian is plainly not “set[ting] forth the names and titles or positions of each person responsible for the denial.” Section 14-2-11(B). We bring this issue to the attention of the City so that it may issue Mr. Jenkins a revised denial letter and because “[d]enials are valuable information-gathering tools” under IPRA. *American Civil Liberties Union of New Mexico v. Duran*, 2016-NMCA-063, ¶ 38.

Conclusion

Based on our review of this complaint, we recommend that the City review its responses to both of Mr. Jenkins’ public records requests. Preliminarily, the City should send him a revised “written explanation of denial” that identifies who specifically made the decision to deny his requests. Section 14-2-11(B). More substantively, if in fact Mr. Jenkins is the parent of the child who was the subject of the abuse or neglect investigation, then the City should review its denial of his requests in light of Section 32A-4-33(A).

More generally, the City should increase the amount of information it conveys to records requestors in its written correspondence. When requesting additional time, the City should explain to the requestor how much time it needs to respond or when specifically it anticipates sending a further response. A statement only that the requestor “will receive further communication when we have completed your request” is, at a minimum, not a best practice and one that instead brings a high likelihood of confusion and frustration. Moreover, at the end of the IPRA process, when denying a particular request, the City needs to “set forth the names and titles or positions of each person responsible for the denial” as expressly mandated by IPRA. Section 14-2-11(B)(2).

For your reference, a copy of the IPRA Guide is available on the website of the Office of the Attorney General at www.nmag.gov. If you have any questions regarding this determination or IPRA in general, please let me know.

Sincerely,



John Kreienkamp
Assistant Attorney General

Enclosure

cc: Christopher Scott Jenkins